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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMON GRIGGS,

Defendant and Appellant.

F075572

(Super. Ct. No. SC083357B)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Michael G. Bush, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Kevin M. Cornwall, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Smith, Acting P.J., Snauffer, J. and DeSantos, J.

INTRODUCTION

Appellant Raymon Griggs filed a petition for recall of his sentence and resentencing under Proposition 36, as codified in Penal Code¹ section 1170.126. The petition was denied, and Griggs appealed. In our unpublished opinion in case No. F070410, this court reversed and remanded the matter for a new hearing. On remand, the superior court again denied the petition, finding that Griggs was ineligible because he was armed with a firearm during the commission of his third strike offense.

Griggs's current appeal contends that he was not "armed" for purposes of section 1170.126 and the superior court applied an incorrect standard of proof in ruling on the petition in light of *People v. Frierson* (2017) 4 Cal.5th 225 (*Frierson*). We reverse and remand.

FACTUAL AND PROCEDURAL SUMMARY

We take portions of the procedural history and facts from our opinions in case Nos. F070410, filed on October 26, 2016, and F040410, filed on July 25, 2003, and partially published as *People v. Griggs* (2003) 110 Cal.App.4th 1137. Griggs also was the defendant in our appellate decision in *People v. Griggs* (1989) 216 Cal.App.3d 734.

Case No. F040410

On January 29, 2002, Griggs was charged in an amended information with: transportation and importation of marijuana (Health & Saf. Code, § 11360, subd. (a)) (count 1); possession of marijuana for sale (Health & Saf. Code, § 11359) (count 2); possession of a firearm by a convicted felon (§ 12021, subd. (a)(1)) (count 4); assault of Jeanetta Pollard with a deadly weapon, a fan (§ 245, subd. (a)(1)) (count 5); assault of Pollard by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) (count 6); assault of Pollard with a deadly weapon, a firearm (§ 245, subd. (a)(2)) (count 7); threatening to commit a crime which would result in death or great bodily

¹ References to code sections are to the Penal Code unless otherwise specified.

injury to another (§ 422) (count 8); and possession of ammunition by a convicted felon (§ 12316, subd. (b)(1)) (count 9).²

In connection with all counts alleged against Griggs, the information alleged that he had previously been convicted in 1988 of assault with a deadly weapon in violation of section 245, subdivision (a)(1), and shooting into an inhabited dwelling in violation of section 246, within the meaning of sections 667, subdivisions (c)-(j), and 1170.12, subdivisions (a)-(e). The information further alleged that Griggs had previously served a separate term in state prison within the meaning of section 667.5, subdivision (b).

On February 6, 2002, a jury, sworn on January 31, 2002, convicted Griggs on counts 1, 2, 4 and 9, and acquitted him on counts 5 through 8. In a bifurcated bench trial held on February 7, 2002, the court granted the People's motion to strike the prior prison term allegations under section 667.5, subdivision (b), and found the two prior convictions alleged true.

On March 7, 2002, the trial court granted Griggs's motion to strike both prior convictions as to counts 1 and 2 only, but denied the motion as to counts 4 and 9. The court denied Griggs's application for probation and sentenced Griggs to a total term of 25 years to life plus one year, comprised of: (1) 25 years to life on counts 4 and 9, with count 9 stayed pursuant to section 654; (2) the upper term of four years on count 1, to be served consecutively with count 4, with all but one year stayed until successful completion of count 4; and (3) the upper term of three years on count 2, stayed pursuant to section 654.

Griggs filed a timely notice of appeal. In our opinion in case No. F040410, this court affirmed the judgment.

² The recitation of facts and procedure in this section is taken from the unpublished portion of the opinion in case No. F040410.

Case No. F070410

On August 7, 2014, Griggs filed a petition to recall his third strike sentence of 25 years to life.³ Griggs argued he was eligible for resentencing under Proposition 36 because he was not convicted of serious or violent felonies. Griggs's petition did not state any facts underlying his 2002 convictions. Instead, Griggs summarized the procedural history of his 2002 convictions and third strike sentence. Griggs asked the superior court to take judicial notice of its own records for his prior convictions.

On August 19, 2014, the People filed opposition to the petition for recall and argued Griggs was ineligible for resentencing because he was "armed with a firearm" during the commission of the underlying offenses. The probation report, which the People submitted as an exhibit, stated that Griggs and two others were taken into custody for conspiracy to transport and sell marijuana, and conspiracy to possess a firearm.

The People argued Griggs was ineligible for resentencing under the "Three Strikes" Reform Act of 2012 (the Act) because he was armed with a firearm during the commission of the underlying offenses, within the meaning of section 667, subdivision (e)(2)(C)(iii), based on the gun found in the trunk of the car which Griggs and two others were occupying.

In denying the petition, the superior court relied upon the preliminary hearing transcript. This court concluded that while the preliminary hearing transcript is part of the record of conviction, Griggs did not enter a plea but was convicted after a jury trial. It is not unduly burdensome to require the People to produce either the transcript of Griggs's jury trial or the entirety of this court's appellate opinion, for the superior court to determine whether Griggs's petition for recall should be granted or denied.

³ The recitation of facts and procedure in this section is taken from our unpublished opinion in case No. F070410.

In reaching this conclusion, we noted it would be appropriate for the superior court to rely on the preliminary hearing transcript to decide Griggs's petition for recall under certain circumstances since it is still part of the entire record of conviction. Accordingly, we remanded the matter to the superior court for a new hearing and determination on Griggs's eligibility, at which only relevant, reliable, and admissible portions of the record of conviction are considered, including the jury trial transcript and/or the unpublished portion of this court's appellate opinion which affirmed his convictions.

Current Appeal

On remand, the People again asserted that Griggs was ineligible for resentencing because he was armed with a firearm within the meaning of section 667, subdivision (e)(2)(C)(iii) during the commission of the offense triggering a third strike sentence. The People's opposition attached the full unpublished opinion of this court in case No. F070410 and the full opinion in case No. F040410 where his convictions were affirmed.

The superior court reviewed and considered all the documentation filed in support of, or in opposition to, the petition prior to ruling and took the matter under submission. On March 21, 2017, the superior court noted it had read *People v. Frutoz* (2017) 8 Cal.App.5th 171 (*Frutoz*) and *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*) before reaching its determination.

The superior court stated it had "relied upon factually [] the unpublished portion of the opinion from [Griggs's] underlying case." The superior court then stated, "I will find during the commission of the offense the defendant was armed with a firearm, therefore he's not eligible."

Griggs filed a timely notice of appeal.

Facts Underlying the Convictions

The superior court relied upon the facts set forth in the unpublished portion of our opinion in case No. F040410 in making its determination to deny the petition. We set

forth the relevant facts as stated in that opinion. On the evening of November 13, 2001, Officer Terry Wainwright, along with two other officers from the Bakersfield Police Department, responded to an apartment in Bakersfield regarding a domestic violence call placed by Pollard, who had been dating Griggs for four to five months. Pollard told Wainwright that while Griggs was in her apartment, she and Griggs began arguing. Pollard was yelling and cussing at Griggs. Griggs began punching her in the head, face and abdomen, and pulled her braided hair extensions, resulting in her being knocked to the floor. While she was on the ground, Griggs swung a floor fan at her; Pollard blocked the blow with her arm. Wainwright noticed some bruising and redness to Pollard's right eye.

Griggs fled the house as Pollard called the police. While still on her cordless telephone, Pollard walked outside her apartment to try to get Griggs's vehicle license number. Pollard told Wainwright that at that time Griggs, who was already in his red Chevy Metro, rolled down the driver's side window, brandished a black and chrome handgun, and threatened to kill her. At that point, Pollard went back inside her apartment in fear for her life.

At trial, Pollard testified that she could not remember if Griggs punched her that night, but she did remember that he threw her on the couch and slapped her once on her face. Pollard denied that Griggs hit her with the fan, although she admitted telling Wainwright that Griggs had tried to hit her with the fan. Pollard testified that before Griggs slapped her, she tried to hit him with the fan, but he blocked the blow. At trial, Pollard testified that Griggs did not point a gun at her that day or threaten to kill or hurt either her or her children, although she admitted telling Wainwright on November 13, 2001, that Griggs had brandished a black and chrome handgun, pointed it at her, and threatened to kill her.

Pollard testified that on the evening of November 12, 2001, she saw a black and chrome handgun that was not hers on top of her bedroom nightstand. Griggs had spent

the night with her that night. Pollard testified this was the same handgun Pollard had told Wainwright Griggs pointed at her the next day. Pollard also testified that on the night of November 12, 2001, she saw a large amount of marijuana in “little Ziploc bags,” which were in an army-green duffel bag belonging to Griggs.

On November 15, 2001, Griggs returned a red Chevy Metro to Enterprise Rent-A-Car. The branch manager at the rental office, Rasmus Jensen, paged Detective Jeffrey Watts to notify him that Griggs was at the rental office. Jensen saw Griggs move items four or five times from the rental car into the trunk of a beige Subaru. Jensen could not see what the items were, although he saw some clothing or cloth, and could not tell what items may have already been in the Subaru. A short time later, Officer Kevin Carson stopped the Subaru. Griggs was in the front passenger seat. Watts arrived on the scene soon after the stop was made.

The driver gave Carson consent to search his person and admitted to the officer that he smokes marijuana and had some in his right front pants pocket, which Carson found. The driver consented to a search of the entire vehicle after Watts stated that Griggs was a wanted suspect. The driver stated that the only property belonging to Griggs was in the back seat.

In the back seat, Watts found oversized men’s clothing, like jackets, and shoes that appeared to be new and were still in their boxes. Watts searched the trunk, which also contained many items of new clothing. Eventually, he found a wallet in a jacket. In the wallet was Griggs’s driver’s license and social security card. Directly underneath the jacket was a fanny pack that contained a nine-millimeter, chrome and black, semiautomatic handgun loaded with a magazine holding nine bullets. On the right side of the trunk, Watts discovered a plastic shopping bag in which were two large Ziploc baggies, each holding a “brick” of approximately one pound of compressed marijuana.⁴

⁴ Based on his training and experience, and the look, smell and packaging of the substance, Watts concluded the material was marijuana.

The marijuana, gun and Griggs's identification were found within two feet of each other in the trunk. Nothing with the driver's name on it was found in the trunk. There was nothing in the fanny pack or shopping bags to identify them or their contents as belonging to Griggs.

Watts searched both Griggs and the driver. Watts found \$852 in currency on Griggs, while he found \$414 on the driver. The money on both Griggs and the driver was in small denominations. Watts found a cellular phone in the passenger compartment of the Subaru. Based on his expertise and experience in marijuana investigations, Watts believed the marijuana, by its sheer quantity, was possessed for the purpose of sale.

By stipulation, the jury was informed that "both [the driver and Griggs] have prior felony convictions."

Griggs testified on his own behalf. He admitted that he had been convicted of two felonies involving moral turpitude. Griggs testified he had known Pollard since August 2001. Griggs, who did not own his own car, explained that he rented the Chevy Metro so he could look for an apartment, since his apartment had been damaged by a fire. Because of the fire damage to his apartment, he stayed at Pollard's apartment on November 11 and 12, 2001. On November 13, after taking a shower, Griggs asked Pollard to bring in his duffel bag from the trunk of the rental car. Griggs testified that the duffel bag contained only clothes; there was no weapon or marijuana in the bag.

Pollard became upset with Griggs after seeing the new clothes in the car trunk. She yelled at him and asked him to leave. Griggs dressed, grabbed his bag, and left. When Griggs returned to the apartment to retrieve his car keys, Pollard yelled at him, picked up the fan, and hit him with it. Griggs grabbed Pollard by the hair and "slung her to the ground." Griggs again left the apartment and drove away. As he drove away, Griggs saw Pollard standing outside with the phone. Griggs denied threatening Pollard and also denied having a firearm with him in the car.

On November 15, 2001, Griggs arrived at the car rental office to return the car. While there, he saw someone whom he had seen previously in his neighborhood and asked the man for a ride. The man agreed, and they moved Griggs's items, which consisted of boxes of shoes, a bag and two jackets, from the Chevy Metro into a Subaru. Most of Griggs's belongings were placed in the back seat, and a few were put in the trunk. Griggs and the man both placed items in the trunk.

Griggs testified that the firearm and the marijuana police later found in the vehicle did not belong to him and denied placing them in the trunk. The money he was carrying was from gambling winnings and a loan his brother made to him to help him get a new apartment. Griggs confirmed that he had a jacket in the trunk, which held a wallet with his identification. In an interview with Watts, Griggs stated he felt there had been a conspiracy against him, which included the burning of his apartment, and that "someone knew [he] was a three strike candidate and was trying to strike [him] out."

DISCUSSION

Griggs contends the evidence is insufficient to establish he was armed with a firearm and thus, ineligible for resentencing. He also contends the superior court applied an incorrect standard of proof.

I. Sufficiency of the Evidence

Proposition 36

"On November 6, 2012, the electorate passed Proposition 36, the Three Strikes Reform Act of 2012 [the Act]," and it became effective the next day. (*People v. Johnson* (2015) 61 Cal.4th 674, 679.) Under the Act, as codified in section 1170.126, "a prisoner currently serving a sentence of 25 years to life under the pre-Proposition 36 version of the Three Strikes law for a third felony conviction that was not a serious or violent felony may be eligible for resentencing as if he or she only had one prior serious or violent felony conviction." (*People v. White* (2014) 223 Cal.App.4th 512, 517 (*White*); § 1170.126, subd. (e).)

“Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria” set forth in section 1170.126, subdivision (e). (§ 1170.126, subd. (f).) “If the petitioner satisfies” the statutory criteria, “the petitioner shall be resentenced ... unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (*Ibid.*)

As relevant to this case, a conviction for being a felon in possession of a firearm does not automatically disqualify a petitioning inmate from resentencing under the Act. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1057 (*Blakely*). Instead, the petitioner is ineligible for resentencing under the Act “if, inter alia, ‘[d]uring the commission of the current offense, the [petitioner] used a firearm, was *armed with a firearm* or deadly weapon, or intended to cause great bodily injury to another person.’ ” (*Blakely*, at p. 1051, italics added; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312 (*Elder*); § 1170.126, subd. (e)(2); § 667, subd. (e)(2)(C)(iii); § 1170.12, subd. (c)(2)(C)(iii).)

Standard of Review

The Act’s resentencing mechanism has three separate aspects: (1) the petition for recall of sentence; (2) a determination of eligibility; and (3) the court’s discretionary determination whether the petitioner poses an unreasonable risk of danger to public safety. (*Frierson, supra*, 4 Cal.5th at p. 234.) In filing a petition for recall under Proposition 36, the petitioning inmate has the initial burden of establishing eligibility, i.e., at a minimum, the requisite conviction and sentence set forth in section 1170.126, subdivision (e)(1). (§ 1170.126, subs. (b), (f).) The prosecution then has the opportunity to oppose the petition by establishing the petitioning inmate is ineligible for resentencing pursuant to the statutory grounds. (§ 1170.126, subd. (e); *People v. Johnson* (2016) 1 Cal.App.5th 953, 964-965.)

The People must prove beyond a reasonable doubt that the petitioning inmate is ineligible for resentencing on statutory grounds. (*Frierson, supra*, 4 Cal.5th at pp. 235-236, 240.) However, a superior court’s determination that a petitioning inmate poses an unreasonable risk of danger to public safety is a discretionary one and need only be proven by a preponderance of the evidence. (*Id.* at pp. 239-240.)

On appeal, we review the superior court’s factual determination that Griggs was armed with a firearm when he committed the offense of felon in possession of a firearm based on the substantial evidence standard. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286 (*Hicks*).)

Analysis

Griggs’s conviction for being a felon in possession of a firearm does not automatically disqualify him from resentencing under the Act unless he was “armed,” i.e., he had the firearm available for offensive or defensive use. (*Blakely, supra*, 225 Cal.App.4th at pp. 1048, 1052; *Osuna, supra*, 225 Cal.App.4th at pp. 1031-1032.) “[W]hile the act of being armed with a firearm ... necessarily requires possession of the firearm, possession of a firearm does not necessarily require that the possessor be armed with it.” (*White, supra*, 223 Cal.App.4th at p. 524.)

“The factual determination of whether the felon-in-possession offense was committed under circumstances that disqualify defendant from resentencing under the Act is analogous to the factual determination of whether a prior conviction was for a serious or violent felony under the three strikes law. Such factual determinations about prior convictions are made by the court based on the record of conviction.” (*Hicks, supra*, 231 Cal.App.4th at p. 286.)

It is well settled that the record of conviction includes the preliminary hearing transcript (*People v. Trujillo* (2006) 40 Cal.4th 165, 180; *People v. Reed* (1996) 13 Cal.4th 217, 224-229; *People v. Gonzales* (2005) 131 Cal.App.4th 767, 773-775); the accusatory pleading and the transcript of a defendant’s plea underlying the prior

conviction (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1045); the transcript of the defendant’s jury trial (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 800-801 (*Brimmer*); and the appellate record, including both published and nonpublished appellate opinions (*People v. Woodell* (1998) 17 Cal.4th 448, 456-457; *Hicks, supra*, 231 Cal.App.4th at p. 286; *Brimmer, supra*, at pp. 800-801; *Elder, supra*, 227 Cal.App.4th at p. 1317; *Osuna, supra*, 225 Cal.App.4th at p. 1030.)

As explained above, a petitioning inmate is ineligible for resentencing under the Act “if, inter alia, ‘[d]uring the commission of the current offense, the [petitioner] used a firearm, was *armed with a firearm* or deadly weapon, or intended to cause great bodily injury to another person.’ ” (*Blakely, supra*, 225 Cal.App.4th at p. 1051, italics added; § 1170.126, subd. (e)(2); § 667, subd. (e)(2)(C)(iii); § 1170.12, subd. (c)(2)(C)(iii); *Elder, supra*, 227 Cal.App.4th at p. 1312.)

A finding that the defendant is armed with a firearm “does not require that a defendant utilize a firearm or even carry one on the body. A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively. [Citations.] ... ‘[A] firearm that is available for use as a weapon creates the very real danger it will be used.’ [Citation.] Therefore, ‘[i]t is the availability—the ready access—of the weapon that constitutes arming.’ ” (*People v. Bland* (1995) 10 Cal.4th 991, 997; *Blakely, supra*, 225 Cal.App.4th at pp. 1051-1052; *Osuna, supra*, 225 Cal.App.4th at p. 1029.) The defendant is considered armed even if the weapon is inoperable or unloaded. (*Brimmer, supra*, 230 Cal.App.4th at p. 799.)

In *Osuna*, this court concluded “the literal language of the Act disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm.” (*Osuna, supra*, 225 Cal.App.4th at p. 1032.) What constitutes “during” is distinguishable from “in the commission of” the offense. (*Frutoz, supra*, 8 Cal.App.5th at p. 179.) “ ‘ “During” is variously defined as “throughout the continuance or course of” or “at some point in the course of.” ’ ” The term “during”

requires “ ‘a temporal nexus between the arming and the underlying felony, not a facilitative one.’ ” (*Id.* at p. 178.) Following this reasoning, Griggs was armed with a firearm during his possession of the firearm, but not in the commission of his crime of possession of the firearm. “ ‘There was no facilitative nexus; his having the firearm available for use did not further his illegal possession of it.’ ” (*Ibid.*)

Here, Griggs was found guilty beyond a reasonable doubt of being a felon in possession of a firearm. The black and chrome firearm was found in the trunk of a car along with other items belonging to Griggs; Griggs had been seen placing items into the trunk shortly before the vehicle was stopped. Pollard testified she had seen Griggs brandishing a black and chrome firearm like the one found in the trunk, further connecting the firearm to Griggs. To find Griggs guilty of possession of a firearm by a felon, the jury had to find the firearm was under Griggs’s dominion and control. (*Frutoz, supra*, 8 Cal.App.5th at p. 176.) Under these circumstances, the firearm also was available to Griggs for offensive or defensive use, even though it was not found on his person. (*Osuna, supra*, 225 Cal.App.4th at pp. 1029-1030.)

A third strike inmate “may be found to have been ‘armed with a firearm’ in the commission of his or her current offense, so as to be disqualified from resentencing under the Act, even if he or she did not carry the firearm on his or her person.” (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 984-985, 992-993 [defendant had firearms available for immediate use and was armed when he was arrested in kitchen, and guns were found in adjacent bedroom and a closet]; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1011-1014 [defendant armed with a firearm when police searched his house while he stood in front doorway, and found loaded handgun in wife’s purse located in bedroom]; *Elder, supra*, 227 Cal.App.4th at p. 1317 [defendant armed with a firearm when his apartment was searched while he was standing outside, and guns were found on shelf of entertainment center and in unlocked bedroom safe]; *People v. Wandick* (1991) 227 Cal.App.3d 918, 921, 928 [defendant armed when

police found him in a bedroom where one firearm was in a holster hanging on bedpost and another in closet drawer]; *People v. Searle* (1989) 213 Cal.App.3d 1091, 1095, 1099 [defendant was armed when he sold cocaine from his car, and a loaded gun was in an unlocked compartment in the back of his car].)

II. Standard of Proof

In December 2017, subsequent to the superior court's determination after remand, the Supreme Court decided *Frierson*, *supra*, 4 Cal.5th 225, holding that the proper standard for determining whether a person is ineligible for resentencing is the proof "beyond a reasonable doubt" standard. (*Id.* at pp. 235-240.) In this case, it is unclear from the record what standard of proof the superior court applied because it did not articulate a standard.⁵

In this court's opinion in *Osuna*, we held the correct standard of proof for all provisions of section 1170.126 was a preponderance of the evidence. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1040.) The *Frierson* decision effectively overrules *Osuna* on this point and holds that proof beyond a reasonable doubt is the correct standard of proof for section 1170.126, subdivision (e), and a preponderance of the evidence is the correct standard of proof if applying section 1170.126, subdivision (f). (*Frierson*, *supra*, 4 Cal.5th at pp. 235-236, 239-240.)

The record is not clear whether the superior court's mention of the *Osuna* case was for its articulation of the standard of proof as a preponderance of the evidence, or under what circumstances a felon convicted of felon in possession of a firearm is ineligible for resentencing, or both. (*Osuna*, *supra*, 225 Cal.App.4th at pp. 1029, 1031-1032, 1040.)

Because it is not clear from the record which standard of proof was applied by the superior court in denying the petition pursuant to section 1170.126, subdivision (e), we

⁵ The court cannot presume that the correct standard was applied due to the uncertainty in the law prior to the *Frierson* decision. (See *Frierson*, *supra*, at pp. 235-236.)

believe the better course is to remand the matter to the superior court for a rehearing where it is clear the standard of proof set forth in *Frierson* has been applied.

If the superior court finds beyond a reasonable doubt that the firearm was under Griggs's dominion and control and it was available for offensive or defensive use, then Griggs was "armed with a firearm during the unlawful possession of that firearm" and is ineligible for resentencing. (*Osuna, supra*, 225 Cal.App.4th at p. 1032.) Multiple cases have held that a defendant who is armed with a firearm while committing the third strike offense of unlawfully possessing that weapon is ineligible for recall and resentencing. (*White, supra*, 223 Cal.App.4th at p. 524; *Blakely, supra*, 225 Cal.App.4th at p. 1054; *Brimmer, supra*, 230 Cal.App.4th at p. 798; *Hicks, supra*, 231 Cal.App.4th at pp. 275, 284; *Elder, supra*, 227 Cal.App.4th at pp. 1312-1313.)

At the rehearing, the superior court can consider denying the petition pursuant to section 1170.126, subdivision (f) if Griggs is found otherwise eligible but the superior court finds by a preponderance of the evidence that his resentencing would pose an unreasonable risk of danger to public safety.

DISPOSITION

The order denying the petition for resentencing is reversed and the matter is remanded to the superior court for a rehearing on the petition for resentencing and for the superior court to apply the beyond a reasonable doubt standard of proof if applying Penal Code section 1170.126, subdivision (e), or a preponderance of the evidence standard if applying Penal Code section 1170.126, subdivision (f) to determine whether Griggs's resentencing poses an unreasonable risk of danger to public safety.